

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the City of Fremont to construct a new public pedestrian/bicycle path and service vehicle at-grade crossing at the Central Park at-grade pedestrian crossing (DOT # 440642C) at railroad Mile Post 1.76 on the Warm Springs Subdivision in City of Fremont, Alameda County, State of California.

Application 13-06-017
(Filed June 21, 2013)

**DECISION GRANTING AUTHORIZATION TO THE CITY OF FREMONT TO
CONSTRUCT A NEW PEDESTRIAN/BICYCLE AND SERVICE VEHICLE AT-
GRADE CROSSING AT RAILROAD MILE POST 1.76 ON THE WARM
SPRINGS SUBDIVISION IN THE CITY OF FREMONT, ALAMEDA COUNTY****Summary**

This decision grants the City of Fremont authorization to construct a new pedestrian/bicycle and service vehicle at-grade crossing located at Mile Post 1.76 on the Union Pacific Railroad Company Warm Springs subdivision track in the City of Fremont, Alameda County. The new crossing will be identified as DOT No. 440642C and CPUC Crossing No. 001DA-1.76-D.

Discussion

The City of Fremont (City) requests authority to construct a new public pedestrian/bicycle and service vehicle at-grade crossing (crossing) over the Union Pacific Railroad Company (UPRR) Warm Springs Subdivision track, at Mile Post 1.76, east of Central Park in the City, adjacent to the location of an

existing private crossing. The existing private crossing is located on the south side of Mission Creek drainage channel, and the new crossing is proposed to be located on the north side of the Mission Creek channel. The California Public Utilities Commission (Commission/CPUC) Staff identified ongoing use of the existing private crossing by pedestrians and directed in a letter to the City dated June 25, 2007, that the City prevent the unauthorized use or improve the crossing and make it public. The City believes public safety, convenience, and necessity requires the construction of a new public pedestrian/bicycle and service vehicle at-grade crossing.

A field diagnostic meeting between CPUC Staff, UPRR, Alameda County Flood Control & Water Conservation District (ACFCWCD) and City was held on July 31, 2007. The participants agreed to the construction of a new at-grade public pedestrian/bicycle crossing with an adjacent new “service vehicle” at-grade private crossing at the proposed location to replace the existing private crossing.

For many years, the public has illegally crossed the existing ACFCWCD private crossing (DOT No. 750055G and CPUC Crossing No. 001DA-1.75-X) and walked along or across the railroad track at other points in the vicinity. This problem has been temporarily mitigated by fencing along the railroad provided by the Bay Area Rapid Transit Tunnel Portal Construction Project. The new crossing will provide a safe and legal way for pedestrians and bicyclists to gain access between Gomes Park, in the Mission Valley Neighborhood, and Central Park, a major recreation facility which includes tennis courts, softball fields, soccer fields, playgrounds, water slide park, boating and picnic areas, without trespassing the railroad right-of-way.

Following construction of the new crossing, ACFCWCD will relinquish its existing private at-grade railroad crossing located on the south Mission Creek levee junction with UPRR track, blocking it with fencing and a locked gate, and redirect all users to the new at-grade crossing. Although the old location will no longer be used to cross the tracks, gates will remain at that location so that maintenance at that location can still be performed. The locked gates will only be used by ACFCWCD for flood control access maintenance. ACFCWCD will establish a new crossing easement with UPRR for the new service vehicle crossing located adjacent to the new pedestrian/bicycle crossing on the north side of the Mission Creek channel.

Pedestrian traffic counts indicate a high pedestrian demand at the proposed crossing location. At the crossing, UPRR operates six trains daily at 10 MPH.

The proposed crossing and pathway project will provide the needed safety improvements for pedestrians and bicyclists travelling between Gomes Park and Central Park. The public currently uses an existing informal and historical path between the two parks, along the Mission Creek channel, crossing the railroad tracks at or near the Alameda County Flood Control channel maintenance access private crossing. Some pedestrians also make use of the railroad trestle over the channel as part of the informal access route. There is strong community opposition to any permanent closure of this pathway. The overall project will include a pathway along the south side of Mission Creek between Gomes Park and the pedestrian/golf cart bridge. The pathway will cross over the ACFCWCD channel via the golf cart/pedestrian bridge and continue west along the north

side of Mission Creek to the proposed pedestrian crossing, and continue west to Central Park.

A grade separation at the crossing location is not practicable due to the proximity of the flood control channel, Lake Elizabeth in Central Park, wetland areas and residential houses.

The crossing will include two Commission Standard 8 warning devices (an automatic flashing light signal assembly), one on each approach, pedestrian swing gates on each approach, concrete crossing surface panels, paved asphalt concrete approaches, and Americans with Disabilities Act detectable warning treatment on both approaches.

The private “service vehicle” crossing is immediately adjacent to the pedestrian crossing, and is separated by fencing and channelization at the approaches. Access to the service vehicle crossing will be limited to ACFCWCD by the use of locked gates.

The design and construction of the new public at-grade pedestrian/bicycle and service vehicle crossing will be funded by the City. However ACFCWCD will enter its own private crossing agreement with UPRR for the service vehicle portion of the crossing.

Environmental Review and CEQA Compliance

The California Environmental Quality Act of 1970 (CEQA, as amended, Public Resources Code Section 21000 et seq.) applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to inform governmental decision-makers and the public about potential, significant environmental effects of the proposed activities. Since the project is subject to CEQA and the Commission must issue a discretionary decision in order for the

project to proceed (i.e., the Commission has the exclusive authority to approve the project pursuant to Section 1202 of the Public Utilities Code), the Commission must consider the environmental consequences of the project by acting as either a lead or responsible agency under CEQA.

The lead agency is either the public agency that carries out the project,¹ or the one with the greatest responsibility for supervising or approving the project as a whole.² The City is the lead agency for the this project, and is proposing to construct a new at-grade pedestrian/bicycle and service vehicle crossing at this location. The Commission is a responsible agency under CEQA because it will be issuing a permit for a portion of the project. As a responsible agency under CEQA, the Commission must consider the lead agency's environmental documents and findings before acting on or approving this project.³ The Commission, as a responsible agency, is responsible for mitigating or avoiding only the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance, or approve.⁴

Pursuant to CEQA, the City prepared an environmental document titled *Central Park Union Pacific Railroad Impact Report*, which identifies environmental impacts and associated mitigation measures related to the Central Park Union Pacific Railroad Crossing. Per CEQA, a *Final Supplemental Environmental Assessment*, dated October 2010, was also completed. It was prepared in

¹ CEQA Guidelines (Title 14 of the California Code of Regulations), Section 15051(a).

² CEQA Guidelines (Title 14 of the California Code of Regulations), Section 15051(b).

³ CEQA Guidelines, Sections 15050(b) and 15096.

⁴ CEQA Guideline Section 15096(g).

accordance with requirements of the Federal Transit Administration and the National Environmental Policy Act (NEPA)⁵. The City approved the CEQA document on October 14, 2010.

In addition, under CEQA the City filed a Notice of Determination (NOD) on October 5, 2010. The NOD states that:

- 1) The project will not have a significant effect on the environment.
- 2) A mitigated negative declaration was prepared for this project pursuant to the provisions of CEQA.
- 3) Mitigation measures were made a condition of the approval of the project.
- 4) A mitigation monitoring or reporting program was adopted for the project.
- 5) A statement of Overriding Considerations was not adopted for this project.
- 6) Findings were made pursuant to the provisions of CEQA.

With respect to biological resources, the Central Park UPRR Initial Study concluded potential significant impacts with regards to future occupation of the site by burrowing owls, Congdon's tarplants, and storm water pollution. Mitigation measures were taken to reduce or eliminate the impacts. Thirty days prior to the start of construction activity, a focused survey for burrowing owls shall be conducted to identify active burrows on and within 250 feet of the railroad crossing. If burrows are found a protection plan shall be prepared by

⁵ 42 USC 4332 (2)(c) of 1969 as amended. Projects undertaken in California that utilize federal funds, require discretionary federal approval, or are undertaken by federal agencies are subject to both NEPA and CEQA.

the biologists with on-site passive relocation techniques. Avoidance measures shall be used when conducting grading activities near Congdon's tarplants. For plants that cannot be avoided, the tarplant shall be removed and dispersed between the nearest project extend. Prior to construction, the top of Mission Creek shall be physically delineated for the implementation of storm water pollution prevention best management practice measures.

The Commission reviewed and considered the NOD and found the document is adequate for our decision-making purposes. As such the Commission need not adopt any alternatives or mitigation measures.

Filing Requirements and Staff Recommendation

This application is in compliance with the Commission's filing requirements including Rule 3.7 of the Rules of Practice and Procedure, which relates to the construction of a public road across a railroad.

The Commission's Safety and Enforcement Division, Office of Rail Safety - Rail Crossings Engineering Section has inspected the site of the proposed crossing, reviewed and analyzed the plans submitted with the application, and recommends that the requested authority to construct the subject at-grade pedestrian/bicycle path and service vehicle highway-rail crossing be granted for a period of three years.

Categorization and Need for Hearings

In Resolution ALJ 176-3318, dated July 23, 2013, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

Assignment of Proceeding

Emory J. Hagan III is the assigned Examiner in this proceeding.

Findings of Fact

1. Notice of the application was published in the Commission's Daily Calendar on July 15, 2013. There are no unresolved matters or protests. A public hearing is not necessary.
2. The City requests authority, under Public Utilities Code Sections 1201-1205, to construct a new at-grade pedestrian/bicycle and service vehicle crossing at railroad Mile Post 1.76 on the UPRR Warm Springs Subdivision in the City of Fremont, Alameda County.
3. The new pedestrian/bicycle and service vehicle crossing will be identified as CPUC Crossing No. 001DA-1.76-D.
4. The City is the lead agency for this project under CEQA, as amended.
5. The City prepared an environmental document titled *Central Park Union Pacific Railroad Impact Report*, which identifies environmental impacts and associated mitigation measures related to the Central Park Union Pacific Railroad crossing.
6. In October of 2010 the City also prepared a *Final Supplemental Environmental Assessment*. It was prepared in accordance with requirements of the Federal Transit Administration and the NEPA.

7. With respect to biological resources, impacts were identified to wildlife, plants, and storm water pollution. The following mitigations will be taken to neutralize the impact on environment. Prior to construction activity a survey for burrowing owls shall be conducted to identify burrows within 250 feet of the site. If found a protection plan shall be prepared for relocation of the owls during construction. Avoidance measures shall be taken during construction for Congdon's tarplants located near the site. For plants that cannot be avoided the tarplant shall be removed and dispersed within the vicinity of the project. Prior to construction, the top of bank of Mission Creek shall be physically delineated for the implementation of storm water pollution prevention best management practice measures.

8. The City prepared a NOD for this project and filed with the County of Alameda Clerk on October 14, 2010, that indicates the project, with mitigations, will not have a significant effect on the environment.

9. The Commission is a responsible agency for this project and has reviewed and considered the lead agency's project *Impact Report, Supplemental Environmental Assessment* and NOD.

10. The environmental documents reflect the Commission's independent judgment and analysis.

Conclusions of Law

1. The NOD prepared by the City as the documentation required by CEQA for the project is adequate for our decision-making purposes.

2. The application is uncontested and a public hearing is not necessary.

3. The application should be granted as set forth in the following order.

O R D E R**IT IS ORDERED** that:

1. The City of Fremont is authorized to construct a new at-grade pedestrian/bicycle and service vehicle crossing located at railroad Mile Post 1.76 on the Union Pacific Railroad Company Warm Springs Subdivision in the City of Fremont, Alameda County.

2. The new pedestrian/bicycle and service vehicle crossing shall be identified as CPUC Crossing No. 001DA-1.76-D.

3. The new pedestrian/bicycle and service vehicle crossing shall be equipped with California Public Utilities Commission Standard 8 warning devices per General Order No. 75-D, and swing gates on each approach. Concrete crossing surface panels and asphalt concrete approaches shall be installed, along with Americans with Disabilities Act detectable warning treatments at both approaches.

4. Fencing and channelization shall be placed between the pedestrian/bicycle crossing and service vehicle crossing, and locked gates placed on the approaches to the service vehicle crossing as shown on the plans included with the application.

5. New fencing and gates shall be constructed to block the existing private crossing (DOT No. 750055G and CPUC Crossing No. 001DA-1.75-X) located on the south side of Mission Creek levee and route all users to the new at-grade crossing located on the north side of the Mission Creek levee. The gates shall only be used by Alameda County Flood Control & Water Conservation District for flood control maintenance access. Otherwise, they shall be locked at all times. Alameda County Flood Control & Water Conservation District shall establish a

new crossing easement and maintenance agreement with Union Pacific Railroad for its portion of the new crossing.

6. The City of Fremont shall notify the California Public Utilities Commission's Safety and Enforcement Division – Rail Crossing Engineering Section at least five business days prior to opening the crossing. Notification should be made to rces@cpuc.ca.gov.

7. Within 30 days after completion of the work under this order, the City of Fremont shall notify the California Public Utilities Commission's Safety and Enforcement Division – Rail Crossing Engineering Section in writing, by submitting a completed Commission Standard Form G (*Report of Changes at Highway Grade Crossings and Separations*), of the completion of the authorized work. Form G requirements and forms can be obtained at the California Public Utilities Commission web site Form G page at <http://www.cpuc.ca.gov/formg>. This report may be submitted electronically to rces@cpuc.ca.gov as outlined on the web page.

8. Within 30 days after completion of the work under this order the Union Pacific Railroad shall notify the Federal Railroad Administration of the changes to the crossing by submitting a U.S.DOT CROSSING INVENTORY FORM, form FRA F6180.71. A copy shall be provided concurrently to the California Public Utilities Commission's Safety and Enforcement Division – Rail Crossings Engineering Section. This copy of the form may be submitted electronically to rces@cpuc.ca.gov.

9. The City of Fremont shall comply with all applicable rules, including California Public Utilities Commission General Orders and the California Manual on Uniform Traffic Control Devices.

10. This authorization shall expire if not exercised within three years, unless time is extended or if the above conditions are not satisfied. The California Public Utilities Commission may revoke or modify this authorization if public convenience, necessity, or safety so require.

11. A request for extension of the three-year authorization period must be submitted to California Public Utilities Commission's Safety and Enforcement Division – Rail Crossing Engineering Section at least 30 days before the expiration of that period. A copy of the request must be sent to all interested parties.

12. The application is granted as set forth above.

13. Application 13-06-017 is closed.

This order is effective today.

Dated _____, at San Francisco, California.